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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

WESTERN CONFERENCE OF TEAMSTERS

PETITIONER

v.

DAIRY DISTRIBUTORS, INC.

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, reversing a decree of the United States District Court for the District of Utah which perpetually enjoined respondent from enforcing a judgment for $100,000 obtained against petitioner in the state courts of Utah.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 294 F2d 348, and is attached to this petition, together with that court's judgment and denial of the petition for rehearing, as Appendix "A". The opinion of the United States District Court is unreported. That court's findings of fact, conclusions of law, and judgment appear in the Record at 44-48 and 51, re-

spectively. The opinion of the Supreme Court of Utah in the prior, related action is reported in 8 Utah 2d 124, 329 P2d 414, and appears in the Record at 221. This Court's denial of certiorari in that prior action appears at 360 U.S. 909 and is attached to this petition as Appendix "B".

JURISDICTION

The judgment of the United States Court of Appeals was entered on August 22, 1961, and a Petition for Rehearing was denied on October 3, 1961, making such judgment final. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the doctrine of res judicata bars a Federal District Court from enjoining, in the exercise of its equity powers and in furtherance of a proper and uniform interpretation of Federal Law, the respondent (Dairy Distributors, Inc.) from enforcing as against the petitioner (Western Conference of Teamsters) a state court judgment for damages, rendered under the provisions of Section 303 of the Labor Management Relations Act, on the ground that the state court's assertion of jurisdiction over the subject matter was based on a misinterpretation of the Act and was clearly repugnant to Congressional intent.

2. Whether a Federal District Court may enjoin the enforcement of said judgment on the ground that respondent's recovery under the Labor Management Relations Act was for injury to a trucking business that was operated in interstate commerce without a permit from the Interstate Commerce Commission in contravention of the Interstate Commerce Act and the National Transportation Policy.

STATUTES INVOLVED

The pertinent provisions of the Labor-Management Relations Act (29 U.S.C. 151, et seq.) are Sections 303, 301(b),

and 2(5). The pertinent provisions of the Interstate Commerce Act (49 U.S.C. 1, et seq.) are Sections 303(a)(15), 309 and 322. The text of the provisions is set forth in Appendix "C".

STATEMENT

A.

Factual Background

The respondent, Dairy Distributors, Inc., is a trucking company, located in Amalga, Utah, formed and owned by one Gossner and his family (R. 262-263). The said Gossner also operated in Utah a cooperative association of milk producers known as the Cache Valley Dairymen's Association and undertook to manufacture and distribute cheese for that Association (R. 259-260). The principal business of the respondent trucking company was to purchase cheese from the Association and truck it to New York City where it was sold principally to one N. Dorman and Company, a wholesale cheese dealer there (R. 94, 263-264). Respondent would then purchase back-haul commodities (mainly calicum chloride) in New York or elsewhere in the East for trucking back to Utah for sale there (R. 94-97, 267-271). As admitted by respondent, this operation was conducted without an ICC permit (R. 40).

Local Union 976 is a local union representing trucking employees, functioning in the Ogden and northern Utah area, and is affiliated with the International Brotherhood of Teamsters (R. 79). For some years, it had a collective bargaining relationship with the Association, but upon termination of the 1952 contract, negotiations for renewal thereof failed.

In May of 1955, in an effort to obtain a new collective bargaining agreement, representatives of Local 976, Joint

Council 67, and the Western States Dairy Council[1] went to New York and there with the aid of New York Local 277, whose members worked for N. Dorman and Company, urged the latter to cease dealing with the Association until bargaining was resumed (R. 223). On July 26, 1955 and on two other subsequent dates, the representatives of Local 976 and Joint Council 67 picketed the trucks of respondent Dairy Distributors at Dorman's loading platform (R. 223-227). It was principally these incidents which induced Dorman to cease doing business with respondent, allegedly causing the latter to liquidate its business and giving rise to the present course of litigation.

B.

The Proceedings Below

1. State Court Proceedings

The respondent Dairy Distributors brought an action in the District Court of the Third Judicial District of Utah in and for Salt Lake County for $125,000 damages, alleging destruction of its business by reason of the above picketing activities (R. 28). The action was founded entirely upon Section 303 of the Labor-Management Relations Act, vesting concurrent jurisdiction upon United States District Courts and state courts having jurisdiction of the parties. Petitioner, Western Conference of Teamsters, and the International Brotherhood of Teamsters were joined as defendants, but no specific activities on their part were

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[1] Joint Council 67 is a council or association of Teamsters Local Unions in the Salt Lake City area (R. 84). The Western States Dairy Council is a council or association of local unions in eleven Western States that represent employees in the dairy industry, and is affiliated with the Western Conference of Teamsters (R. 74-75, 84-85). The petitioner, Western Conference of Teamsters, is an association of Teamsters Local and Joint Councils in the eleven Western States and is an affiliate of the International Brotherhood of Teamsters. All of these labor associations are separate entities functioning autonomously. (R. 74, 80-81).

alleged. Defendant Western Conference (petitioner here) answered, denying the allegations of the complaint and asserting that it was not subject to service of process in the State of Utah (R. 237, 238).

The case was tried in October of 1957 before an eight-man jury. During the course of trial, Western Conference moved the court to dismiss on the grounds that it is not subject to service of process in Utah and is not a "labor organization" within the meaning of the Act. The motion was denied. The jury returned a verdict against all defendants in the amount of $100,000 and judgment was entered thereon. (R. 240, 241).

Thereafter, defendants filed appropriate motions for judgment in their favor notwithstanding the verdict, and for a new trial, which motions were denied (R. 241-243).

The case was then appealed to the Supreme Court of Utah, the defendants (including petitioner) assigning as error, *inter alia*, plaintiff's failure to establish a case under Section 303 of the Act, lack of jurisdiction over the subject matter as to the Western Conference, lack of jurisdiction over the person of Western Conference and the International Union, and failure to grant a directed verdict on the ground that plaintiff was unlawfully engaged in interstate commerce at the times complained of. (R. 35-37). The Supreme Court of Utah affirmed the jugment below, two of the five justices concurring in the results only (R. 220, 221).

Following such decision, defendants filed a petition for rehearing (R. 38, 39), which petition was denied on January 26, 1959 (R. 221).

Defendants then petitioned this Court for a Writ of Certiorari, submitting as reasons for the grant thereof, the following:

1. The Western Conference and the International Union could not be held responsible under Section 301(e) for the alleged unlawful picketing.

2. The picketing involved did not violate Section 303.

3. The injury to respondent's business was not caused by a violation of the Act, as required by Section 303(b). The damages awarded were speculative and excessive. Damages should not be awarded to respondent, as it operated unlawfully in interstate commerce without an ICC permit.

This Cou ' denied the petition (App. "B").

2. Subsequent Federal Court Proceedings

Petitioner, Western Conference of Teamsters, brought an action in equity in the United States District Court for the District of Utah, Central Division, seeking to enjoin the enforcement of the state court judgment against petitioner. Jurisdiction of the court was invoked pursuant to 28 USC §§ 1332 and 1337. In support of the action, petitioner asserted the following:

(a) The state court was without jurisdiction over the subject matter, in that Petitioner is not a "labor organization" within the meaning of the Labor-Management Relations Act.

(b) The state court did not acquire personal jurisdiction over petitioner, as service of process was not properly effected.

(c) Respondent was not entitled to recover on account of injury to a business operated illegally without proper authority from the ICC.

(d) Respondent, in the state court trial, failed to disclose that Local 277 in New York had been enjoined in another action, and thus deprived petitioner of a defense that respondent's business could not have been damaged by the conduct of Local 277, and practiced fraud upon the court. (R.1).

The issues set forth above were delineated in the pre-

trial order of the United States Judge (R. 43, 44). The respondent, defendant below, interposed motions to dismiss and for summary judgment, principally on the ground that the issues raised by petitioner had been determined and adjudicated in the state courts (R. 39, 43). These motions were denied and the case went to trial in the United States District Court.

During the course of trial, petitioner proved the facts as set forth above relating to the operation of respondent's business in hauling cheese and other commodities in interstate commerce without authority from the Interstate Commerce Commission (R. 94-97, 106-110, 259-260, 262-264, 267-271).

It was further proved that the purported service of process upon petitioner in the state court was had upon one Ballew, who was neither an employee or agent of petitioner nor acting on its behalft in any capacity. The evidence showed that Ballew was at that time employed by the Western States Dairy Employees Council, which association operated independently without any direction or control on the part of petitioner. Moreover, petitioner had no property or place of business in the State of Utah and did no business therein (R. 57, 69-82, 125-127).

With respect to petitioner's allegation that the state court was without jurisdiction of the subject matter, it was developed in the record that Western Conference of Teamsters does not exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. Further, said petitioner is not an organization in which employees participate respecting conditions of work and is not an organization in which employees are eligible to membership or affiliation (R. 55-66).

On the basis of the foregoing evidence, the judge found

the issues in favor of petitioner[2] and issued a judgment and decree perpetually enjoining respondent from enforcing its state court judgment against petitioner (R. 51).

Respondent then appealed to the United States Court of Appeals for the Tenth Circuit, urging that the issues raised by petitioner had been adjudicated in the state courts and thus subject to the doctrine of res judicata and that, in any event, petitioner is a "labor organization" within the meaning of the Act and there was insufficient evidence to support the finding that respondent's business was illegal under the Interstate Commerce Act.

The Court of Appeals held that consideration of the matter of the state court's jurisdiction, both of subject matter and of person, is now barred by the doctrine of res judicata. The court recognized that the state court ruling respecting its jurisdiction over the subject matter depends upon "an interpretation of Sec. 2(5) of the Act and the correctness of such rulings is of utmost importance in the administration of the Act", but concluded that adequate protection lies in the Supreme Court's power to review such state court rulings by certiorari. The court concluded that the Supreme Court's denial of certiorari from the judgment of the Utah Supreme Court served "to establish the finality of the judgment as between the particular parties."

Respecting petitioner's contention that respondent's operation was in violation of the ICA, the court noted that "the opinion of the Supreme Court of Utah may indicate that that court considered this point upon an erroneous assumption of fact"[3] and, further, "we cannot clearly de-

[2] Except that as to the issue of fraud, the judge found the evidence insufficient.

[3] This has reference to the fact that the Utah Supreme Court apparently proceeded on the assumption that respondent does possess an ICC permit, despite respondent's admission to the contrary. 329 P.2d at 420.

termine whether the Utah Court considered and acted upon the issue." The court nevertheless went on to hold that the issue may not be raised by petitioner in defense, since the ICA provides for remedy for violations thereunder before the ICC and limits the role of the courts to reviewing orders of that body.

As to the fraud issue, the court held with the District Court that the claim lacks merit and held it barred by res judicata.

Accordingly, the court reversed and remanded with directions to vacate the injunction. Petition for rehearing was denied on October 3, 1961.

REASONS FOR GRANTING OF WRIT

I.

THIS CASE INVOLVES IMPORTANT ISSUES OF FEDERAL LAW, NAMELY, WHETHER THE DOCTRINE OF RES JUDICATA PRECLUDES A FEDERAL COURT FROM CORRECTING A STATE COURT'S ERRONEOUS DETERMINATION OF FEDERAL LAW, AND WHETHER A FEDERAL COURT HAS AUTHORITY TO ENJOIN THE ENFORCEMENT OF A STATE COURT JUDGMENT WHICH FAILED TO ACCOMMODATE TWO FEDERAL LAWS BY PERMITTING RECOVERY OF DAMAGES UNDER ONE FOR INJURY TO A BUSINESS OPERATED IN VIOLATION OF ANOTHER.

The basic issues in this case fully warrant review by this Court. The court below has decided important questions of Federal law which should be settled by this Court and which are probably in conflict with applicable decisions of this Court. The first issue is whether the Federal courts have jurisdiction and authority in collateral proceedings

(as distinguished from direct review by appeal or writ of certiorari to this Court) to examine and correct determination of state courts interpreting Federal law where such interpretations are clearly in error and repugnant to Congressional intent. The extent to which the doctrine of res judicata should be relaxed in such a situation has been suggested but not finally decided by this Court. To permit such relaxation in the circumstances of the present case, typical of many others, would be to provide a method of determination of Federal issues by the Federal courts without the necessity of burdening this Court with review of the many decisions of state courts on Federal questions, where the issues may not be of sufficient importance to warrant the granting of an appeal or a writ of certiorari. It would make for a uniformity of interpretation that would not otherwise be possible without imposing impossible burdens on this Court. In the present case the Supreme Court of Utah, in another proceeding, has announced an interpretation of the Taft-Hartley Act which seems obviously in error and which a Federal District Court has undertaken to correct by means of enjoining the enforcement of a judgment for damages granted as a result of such interpretation. But the court below has reversed on the ground that the doctrine of res judicata bars further Federal consideration of the state determination, particularly where review of the state court decision has been denied by this Court.

An incidental important question of Federal law which can be adjudicated by the Federal courts, although it need not necessarily be decided by this Court if the collateral proceedings in the district court are sustained, involves the issue of whether Section 2 (5) of the Taft-Hartley Act defining the term "labor organization" embraces such entities as "conferences." A determination of the question, important to the administration of the National Labor Relations Act as amended, is one which the Federal courts should be given an opportunity to make.

A final important question of Federal law which should be settled by this Court is that of the degree to which two non-conflicting Federal statutes in the same field should be accommodated or harmonized so as to bar a person operating a business in violation of the policies and provisions of the one statute from benefitting thereby by resorting to the other for claimed injury to said business.

The remaining portions of this petition will elaborate on the foregoing and make reference to the applicable law.

II.

THE STATE COURTS CLEARLY MISAPPLIED FEDERAL LAW IN ASSERTING JURISDICTION OVER SUBJECT MATTER. CONSIDERATION OF THIS ISSUE BY THE FEDERAL DISTRICT COURT IS NOT BARRED BY THE DOCTRINE OF RES JUDICATA.

A. Section 303 of the Labor Management Relations Act makes unlawful certain activities on the part of a "labor organization" and permits injured persons to bring suit for damages in United States or state courts, "subject to the limitations and provisions of section 301 hereof." Section 301, in turn, refers to violations by "a labor organization representing employees in an industry affecting commerce as defined by this Act." The sole definition of "labor organization" in the Act appears in Section 2(5), which provides:

> "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employees concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

As appears in the record and as found by the United States District Court, the Western Conference of Team-

sters does not fall within the foregoing definition, in that it is not an organization in which employees participate and does not exist for the purpose of dealing with employees concerning any of the subjects mentioned.

Petitioner's exclusion from the operation of the Act has been made patently clear by legislative history. Thus, Senator Goldwater specifically referred to petitioner during Senate consideration of a proposed amendment to the definition of "labor organization", declaring:

> "The Amendment would modify the definition of a 'labor organization' contained in the committee bill. The committee bill, as in both the Wagner and Taft-Hartley Acts, defines a 'labor organization' as one in which employees participate and which exists for the purpose, in whole or in part, of engaging in collective bargaining. Conferences, such as the Western Conference of Teamsters . . . are not composed of employees and do not engage in collective bargaining. The committee bill's definition thus does not include any conference, joint board, joint council, or other association or aggregation of representatives of labor unions, thus freeing them from the sanctions, prohibitions, and other requirements of the bill."
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> "What is of great concern, Mr. President, is the fact that the committee bill does not even cover the Western Conference of Teamsters. . . ." (Cong. Record, Senate, April 23, 1959)

Petitioner was once again mentioned specifically in the same session of Congress. In discussing the Act's definition of a "labor organization", a Senate Report referred to the regional conferences into which the Teamsters are divided, particularly the Western Conference, and stated: "Associations of this kind are not labor organizations under existing

law nor would they be under the committee bill . . ." *Cong. Rec., Senate Report 187, 86th Cong., Par. XX.*[4]

As late as September 19, 1961, it was made evident that Congress continues to adhere to its original intention respecting the scope of Section 2(5). On that date, Senator McClellan and others introduced a bill (S. 2573) designed to amend the Anti-Trust laws to prohibit certain activities by labor organizations. The Bill defines "labor organization" to include "any national or international labor organization or federation thereof, and any conference, general committee, joint or system board, joint council or parent, regional, state, or local central labor body." The Analysis of this portion of the Bill states:

> "The approach involved here is that used in the definition of the Landrum-Griffin Act, but broadened so as to include labor organizations which the Landrum-Griffin Act fails to cover such as State or local central bodies." (107 Cong. Record (daily) pp. 18943, 18944—September 19, 1961).

In light of the above, it is apparent that the Western Conference of Teamsters is exempt from the prohibition of Section 303 and that the state court's assertion of jurisdiction, on the basis of that Section, constituted a misinterpretation and misapplication of the Federal Act in disregard of a clear Congressional mandate.

B. In *Chicot County Drainage District* v. *Boston State Bank*, 308 U.S. 371, this Court rather strictly applied the doctrine of res judicata principally relied upon by the Court below. In subsequent cases, however, the Court

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[4] It should be noted, in this connection, that the NLRB has consistently held that Teamster Area Trade Divisions, affiliated with Teamster Conferences, are not "labor organizations" within the meaning of the Act. *Seaboard Warehouse Terminals*, 123 NLRB No. 48; *Glass Arts, Inc.*, 124 NLRB No. 192. (Footnote ours)

has indicated that the doctrine was not to be generally applied in mechanical fashion. In *Kalb* v. *Feuerstein*, 308 U.S. 433, for example, debtor farmers against whom foreclosure judgment had been obtained by mortgagees in a Wisconsin County Court petitioned a federal court for composition of their debts under the Bankruptcy (Frazier-Lemke) Act. While the petition was pending, the Wisconsin Supreme Court affirmed the foreclosure judgment, holding that the Federal Act did not oust the state courts of jurisdiction over subject matter. Upon grant of Certiorari, this Court noted, in language appropriate to the instant case, that if the Frazier-Lemke Act does oust the state courts of jurisdiction upon the filing of the petition, the state court's decision—

> "was not merely erroneous but was beyond its power, void, and subject to collateral attack. And the determination whether the Act did so operate is a construction of that Act and a federal question." (at 438).

The Court held with the petitioner, reversing the state court judgment.

Again, in *United States v. U.S. Fidelity Co.*, 309 U.S. 506, the Court held that a decision of a Missouri District Court, allowing a cross-claim against the United States, did not bar the United States from successfully asserting, in a subsequent action brought by it, that the first court was without jurisdiction respecting the cross claim because of the doctrine of sovereign immunity. The Court distinguished *Chicot County* in the following manner:

> "In the *Chicot County* case no inflexible rule as to collateral objection in general to judgments was declared . . . No examination was made of the *susceptibility to such objection of* numerous groups of judgments concerning status, extra-territorial action of courts, or *strictly jurisdictional and quasi-jurisdictional facts.*" (at 514) (emphasis supplied)

In *Denver Building and Construction Trades Council v. National Labor Relations Board*, 186 F. 2d 326[5], the United States Court of Appeals for the District of Columbia held that a decision of the United States District Court of Colorado, to the effect that in a particular labor dispute federal jurisdictional requisites were not met and hence an injunction could not issue, was not res judicata as to the jurisdictional question when the same dispute came before the National Labor Relations Board and the United States Court of Appeals. In a statement particularly appropriate to the present case, the Court of Appeals said (at page 332):

> "Where the application of the judicial doctrine res judicata would be inconsistent with the method devised by Congress the doctrine will not be enforced by the courts. Kalb v. Feuerstein, 1940, 308 U.S. 433, 444, 60 S. Ct., 343, 84 L.Ed. 370. It is for this reason we hold against the contention of petitioners, and not because of lack of any of the elements which usually make out a case for the application of res judicata. The doctrine is not to be used where the circumstances create a semblance of conditions for its application but to apply it would submerge the plan of Congress for the administration and enforcement of its policy."

Using the fact situations of some of the above cases as illustrations, the Restatement of Judgments, Para. 10 (1942) states the prevailing rule as follows:

> "(1) Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court does not have jurisdiction over the subject matter, *unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction.* (emphasis supplied)

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[5] Rev'd on other grounds, 341 U.S. 675.

(2) Among the factors appropriate to be considered in determining that collateral attack should be permitted are that

(a) the lack of jurisdiction over the subject matter was clear;

(b) the determination as to jurisdiction depended upon a question of law, rather than of fact;

(c) the court was one of limited and not of general jurisdiction;

(d) the question of jurisdiction was not actually litigated;

(e) the policy against the court's acting beyond its jurisdiction is strong."

Petitioner submits that factors (a), (b), (c) and (e) are firmly established in this case. First, that the state court's lack of jurisdiction over subject matter is clear was demonstrated under point 1 above. Second, while the interpretation of Section 303 and its application involved a mixed question of law and fact, the question should have been disposed of as a matter of law in view of the legislative history. Third, in deciding cases under the Labor Management Relations Act, a state court is one of strictly limited jurisdiction, its jurisdictional boundaries being precisely defined in Sections 303 and 301 of the Act.

Most crucial, however, is the importance of the policy against the state court's acting beyond its jurisdiction. Congress has clearly indicated that the Labor Management Relations Act is to govern solely the tri-partite relationship between employers, labor organizations, and employees in the context of collective bargaining, based on its finding that it is precisely in this area that disputes have occurred, and may again occur, "affecting commerce".[4] And, con-

[4] The Act's Declaration of Policy states:

"It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both

versely, Congress determined that activities of *associations of labor unions* that do *not* operate in this well defined area are not likely to "affect commerce" and therefore should not be subject to regulation under the Act. Accordingly, in conformity with the foregoing determinations and objectives, Congress narrowly defined a "labor organization," and hence the scope of the Act, as one in which employees participate and one which engages in collective bargaining. It is this clearly defined Congressional policy that the state court's decision contravened. That decision stands as a dangerous precedent not only for the Western Conference, but for all other associations and conferences in the labor movement that do not constitute a "labor organization" within the meaning of the Act.[7]

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employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of *individual employees in their relations with labor organizations whose activities affect commerce, to define and prescribe practices on the part of labor and management which affect commerce* and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes *affecting commerce*. (emphasis supplied).

Section 1 of the Act provides in part:

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions in the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred *by encouraging the practice and procedure of collective bargaining* and by protecting the exercise by workers of full freedom of association, self-organization, and *designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection*." (emphasis supplied)

[7] E.g., Alpert v. Local 271, Hod Carriers (D.C. R.I. 1961), 48 LRRM 3043 (held, R.I. Allied Bldg. Trades Council not a "labor organization").

Although Section 303 vests concurrent jurisdiction in state and federal courts, the structure of the Act and decisions of this Court[8] make it plain that the federal law is exclusive in the field and must be interpreted uniformly throughout the 50 states of the union. Thus, as stated by the Court below, the correctness of the decision of the state courts in the instant case involving the very scope of the Act "is of utmost importance in the administration of the Act."[9] Where, as here, the state courts assert jurisdiction of the subject matter upon an interpretation of federal law that has the effect of enlarging the scope thereof in clear contravention of Congressional policy, the Federal District Courts should not be denied the right to exercise a corrective function.[10]

Petitioner respectfully submits that the foregoing considerations far outweigh the policy underlying the doctrine of res judicata and justify the granting of a writ of certiorari.

[8] e.g., *P.S. Guss* v. *Utah Labor Relations Board*, 353 U.S. 1; *Garner* v. *Teamsters Local 776*, 346 U.S. 485.

[9] The opinion of the Court below that nevertheless the power of certiorari may effectively safeguard against errant applications of the Act by state courts seems unrealistic in view of this Court's increasing caseload and decreasing grants of certiorari. (See 75 Harv. Law. Rev. 83 (1961)).

[10] The conclusion of the Court below that this Court's denial of certiorari in the first action established "the finality of the judgment" and thus gave rise to the bar of res judicata ignores the Supreme Court cases previously cited and misconceives the import of a denial of certiorari. This Court has repeatedly held that a denial of certiorari is to have no more meaning than an indication that 4 or more members of the Court, for whatever reason, do not now wish to review the case submitted. *Darr* v. *Burford*, 339 U.S. 200, 226-228 *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 917-920. Moreover, the Court has in the past granted second applications for certiorari upon subsequent litigation in the courts below by the same parties respecting the same issues as those involved in a case wherein certiorari had once been denied. *Brown* v. *Allen*, 344 U.S. 443; *Sunal* v. *Large*, 332 U.S. 174.

III

FEDERAL COURTS MAY ACT TO PROTECT AND UPHOLD THE POLICIES OF THE INTERSTATE COMMERCE ACT, EVEN THOUGH SUCH MATTERS HAD NOT BEEN FIRST PRESENTED TO AND ACTED UPON BY THE INTERSTATE COMMERCE COMMISSION, IN THE INTEREST OF ACCOMMODATING AND HARMONIZING FEDERAL LAWS.

A. The Interstate Commerce Act (49 USC 1, et seq.) defines a "contract carrier" (Para. 303(a) (15)) and provides that no person shall engage in operations in interstate commerce as a "contract carrier" without having first secured a permit from the ICC (Sec. 309). The Act also makes it a criminal offense for any person knowingly and willfully to violate any of its provisions (Sec. 322).

The evidence introduced in the District Court proved that respondent operated as a "contract carrier" and respondent admitted that it did so without an ICC permit. The issue of law thus posed was whether respondent may recover damages pursuant to one federal law for injury to a business that has been operated, since the beginning of its existence, in criminal violation of another federal law. The Federal District Court answered in the negative and enjoined the enforcement of the state court judgment.

The court below neither overturned the fact findings of the District Court nor interposed the bar of res judicata.[11] It held instead that, under the ICA, the sole allowable ac-

[11] Respecting res judicata, the court below noted that the Supreme Court of Utah, having held that respondent did have an ICC permit in the face of the latter's admission to the contrary, apparently "considered this point upon an erroneous assumption of fact." The court below added: "From the record before us and the opinion of the Supreme Court of Utah, we cannot clearly determine whether the Utah court considered and acted upon the issue."

tion lies before the ICC and the role of the courts is limited to reviewing the action of that body. Accordingly it stated that petitioner may not raise a violation of the ICA as a defense in any action brought in the courts. It is respectfully submitted that the opinion of the Court below overlooks the basic necessity of accommodating the policies of the various federal laws in the national interest.

B. While the Interstate Commerce Act may provide only for its use as a sword before the ICC, Petitioner's reliance on its terms as a shield is not precluded. Were petitioner's contention adopted, respondent would not have been "punished", in the affirmative sense used in the Act, but merely precluded from taking advantage of one federal law to promote a venture in violation of another. On this matter, the ICA is silent. Surely, Congress could not have intended, by its silence, to preclude litigants from relying on *the policies underlying the Act*, and thus promoting them, in any manner other than that specifically expressed. For, as stated by this Court:

> "When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted." *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U.S. 173.

In *Sage* v. *Hampe*, 235 U.S. 99, this Court had before it a decision of the Supreme Court of Kansas awarding damages to plaintiff on the ground that defendant breached a contract for the sale of land, which land was not his in that it had been allotted to an Indian tribe by an Act of Congress. The decision below was reversed, Mr. Justice Holmes writing as follows:

> "The defendant relied upon the Act of Congress as a defense and is entitled to come to this court. It has long

been recognized that contracts that obviously and directly tend in a marked degree to bring about results that the law seeks to prevent cannot be made the ground of a successful suit. . . . The policy involved here is the policy of the United States. It is not a matter that the States can regard or disregard at their will. . . . *As . . . the contract contravenes the policy of the law, there is no reason why the law should not be read, if necessary, as broad enough to embrace it in terms.*" (emphasis supplied)

The importance of the mutual accommodation of federal laws has long been recognized by this Court. *In Southern S.S. Co. v. NLRB*, 316 U.S. 31, the Court made it clear that the accommodation principle is specifically applicable to the enforcement and administration of the Labor Management Relations Act. There, the National Labor Relations Board found that the Company's discharge of five seamen represented by the NMU violated Section 8(3) of the LMRA, in that it was based upon the seamen's participation in a protected strike on board a Company vessel docked at Houston. The Board ordered the Company to reinstate the five individuals with back pay. This Court held that the order of reinstatement be set aside because the five men were guilty of mutiny under Sections 292 and 293 of the Criminal Code.[12] In language that appears conclusive as to the instance case, the Court said:

> "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly, that it may wholly ignore other and equally important Congressional objectives. Frequently, the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

[12] Significantly, that statute, as the ICA, provides for criminal penalties, but makes no mention of its use in defense.

In a subsequent case, a possible conflict between the ICA and the LMRA was before this Court. *Local 1976, U.B.C. & J. v. NLRB*, 357 U.S. 93. The principle issue in the case was whether a "hot cargo" agreement between an employer and a union constitutes a defense for union activities that would otherwise violate the secondary boycott provisions of the Act. One of the contentions advanced by the Board was that the stated defense would not lie because, where the employer is an interstate carrier, the "hot cargo" agreement is void *ab initio* under the ICA. This contention was rejected by a majority of the Court on the ground that a possible violation of the ICA may not give rise to a separate violation under the LMRA. In distinguishing *Southern Steamship*, the Court stated:

> [In *Southern Steamship*] a specific remedy ordered by the Board . . . *worked directly to weaken the effectiveness of a statutory prohibition* against mutiny by members of the crew of a vessel. Presumed illegality under the mutiny statute *was not used to establish a violation of the labor statute*." (emphasis supplied)

The foregoing indicates that the instant case is akin to *Southern Steamship*, but unlike *Local 1976*. For here, as in the former case, petitioner relies on the ICA *not to establish a violation of the LMRA* but to deprive respondent of a remedy under the latter that would directly weaken the effectiveness of the former. And here, as in *Southern Steamship*, it is not too much to demand that the state and federal courts undertake the task of accommodation where recovery under the LMRA would seriously impair the Congressional policy underlying the ICA.

C. A brief examination of I.C.A. policy will make manifest the gravity of the conflict involved herein. The National Transportation Policy of the United States is expressed by Congress as follows:

"It is hereby declared to be the national transporta-

tion policy of the Congress *to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act . . .* so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster *sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; . . .* All of the provisions of this Act shall be administered and enforced with a view of carrying out the above declaration of policy." (emphasis added)[13]

The operations of respondent, Dairy Distributors, were in violation of the spirit, as well as the letter, of this policy. One dangerous aspect of its unlawful operation was its transportation of commodities for rates that may not have been competitive. Another was the diversion of traffic which would otherwise have been transported by regulated, authorized carriers as desired by Congress.

The operations of respondent, Dairy Distributors, when viewed as part ~~were in~~ of a pattern of similar operations, exercised a substantial impact on the transportation industry. Unauthorized transportation activity has been variously estimated as accounting for from about 4.5% to about 25% of the total intercity ton-miles for the for-hire and private trucking operations.[14] Increasingly, informed commentators are speaking out about the necessity of bringing unauthorized carriage under control, because "moonlighters" are at a competitive ad-

[13] Ch. 722, Tit. I, §1, 54 Stat. 899 (1940), also appearing in note preceding 49 U.S.C. §1.

[14] Interstate Commerce Commission, Bureau of Transport Economies and Statistics, Statement No. 6010, "Gray Area of Transportation Operations", p. 13 (1960); "Traffic World", Vol. 107, No. 9, p. 29 (March 4, 1961).

vantage and are able to divert substantial amounts of traffic from the certified carriers, resulting in many instances in the crippling of rate structures.[15] The entire transportation industry has been adversely affected.

D. Petitioner submits that as the decision below and those of the Utah State Courts condone and encourage the contravention of the National Transportation Policy, deprive litigants of the right to rely on said Policy in the courts, and fail completely to accommodate the directly conflicting policies of the Labor Management Relations Act and the Interstate Commerce Act, contrary to the direction of this Court, the intervention of this court is required.

CONCLUSION

It is respectfully submitted that, for the reasons asserted above, this Petition for a Writ of Certiorari should be granted.

CLARENCE M. BECK
A. PARK SMOOT
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Washington 5, D. C.

Counsel for Petitioner

[15] See, e.g., John P. Doyle Report for the Committee on Interstate and Foreign Commerce, U. S. Senate, pp 507-514 (1961).

Appendix "A"

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

July Term, 1961

DAIRY DISTRIBUTORS, INC., *Appellant*, vs. WESTERN CONFERENCE OF TEAMSTERS, *Appellee*.	No. 6629

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Arthur A. Allen (Hanson, Baldwin & Allen were with him on the brief) for Appellant.

Elias Hansen (Clarence M. Beck and A. Park Smoot were with him on the brief) for Appellee.

Douglas McHendrie (John F. Mueller and Grant, Shafroth, Toll and McHendrie were with him on the brief) for Amici Curiae.

Before PHILLIPS, PICKETT and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

This appeal is taken from a decree of the District Court for the District of Utah which perpetually enjoined Dairy Distributors, Inc. from enforcing a judgment for $100,000 obtained against the Western Conference of Teamsters in

the state courts of Utah. Appellant's basic contention of error is that the United States District Court has but relitigated issues fully determined in the state court action and has premised the injunction upon findings of fact and conclusions of law that are in simple disagreement with the findings and conclusions of the state court. The United States District Court so says appellant, has undertaken to sit in appellate review upon a state court case after that case has been set at final rest by the Supreme Court of Utah. Appellee defends the issuance of the injunction upon the ground that the federal district court has correctly found that the state court judgment was without jurisdictional foundation of either person or subject matter and upon issues involving a federal question. We will hereafter refer to appellant here and plaintiff in the state court action as the Company and appellee here and defendant in state court as Western Conference.

The factual background of the controversy as it developed and reached the state courts of Utah is fully set forth in the opinion of the Supreme Court of Utah. See *Dairy Distributors* v. *Local Union 976*, 8 Utah 2d 124, 329 P. 2d 414, cert. den. 360 U.S. 909. In brief, the action was brought by the Company to recover for damages occasioned by Local-Union 976, Joint Council 67, Western Conference, The International Brotherhood of Teamsters, and others, through conduct prohibited by 29, U.S.C.A. 187 (Sec. 303, Labor Management Relations Act, 61 Stat 158).[1] Jurisdic-

[1] 29 U.S.C.A. 187.

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

tion of such a cause of action is granted to state courts having jurisdiction of the parties by Sec. 303(b) of the Act. Jurisdiction also specifically lies in the district court of the United States.

Among the defenses advanced by Western Conference in the state court action were the claims that service of process was invalid and that the state court lacked jurisdiction of the subject matter as it applied to Western Conference. Specifically, Western Conference contended that it was not a labor organization as that term is included in the provisions of the Labor Management Act.[2] Both issues were decided adversely to Western Conference in the state trial court and presented to the Utah Supreme Court on appeal. That high court held, 329 P. 2d 414 at 419:

> "Defendant's Point II contends that the Western Conference of Teamsters is exempt from this litigation, not being a labor organization within the contemplation of Title 29, Sec. 152(5) U.S.C.A. There is evidence in the

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"(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

• • • • • • • • • "

[2] Sec. 2(5), 29 U.S.C.A. 152(5).

"The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

record to indicate that Western Conference of Teamsters had jurisdiction over local teamster unions in the 11 western states; that Local 976, of which Rash was an officer, was affiliated with the Western Conference, and that it in turn was affiliated with the International Union. Under such circumstances we cannot say that the Western Conference of Teamsters was not a labor organization under the broad definition of the act."

But both issues were found by the United States District Court in favor of Western Conference as follow:

"IV. The purported service of process upon Western Conference of Teamsters in the aforementioned state court case was had upon one Joseph Ballew. The court finds that at the time the said Joseph Ballew was so served he was a stranger to Western Conference of Teamsters in that he was not an employee, officer, general agent or other agent of the plaintiff herein nor had he ever been, nor was he at that time or ever authorized by appointment nor by law to receive service for or in behalf of the plaintiff herein. Plaintiff Western Conference of Teamsters, during all times mentioned in the state court action, had no property in the State of Utah, neither did it have, nor did it hold itself out as having, an office or place of business in the State of Utah, nor did it do any business in the State of Utah."

"VII. The court finds that plaintiff, Western Conference of Teamsters, is not and never has been an organization in which employees participate respecting hours or conditions of work and labor or an organization in which employees are eligible to membership or affiliation, within the meaning of the 'Labor Management Relations Act, 1947'."

The grant of jurisdiction to state courts to try and decide certain issues arising under the Labor Management Act carries with it the inherent power to interpret the Act

and to decide factual matters necessary for the proper and lawful administration of the Act. The grant of such jurisdiction to state courts and the similar grant to the United States District Court does not contemplate a dual remedy or a dry run in either court. It does contemplate a finality of determination in either jurisdiction of every proper issue presented. The rule is not altered nor weakened by the event that the issue may reach the field of jurisdiction when that subject is dependent upon fact affecting person or subject matter. The issue of jurisdiction must reach finality the same as any other issue. *Lewis* v. *Carver*, 10 Cir. 237 F. 2d 516; *American Surety of New York* v. *Baldwin*, 267 U.S. 156, 53 S. Ct. 98, 77 L. Ed. 231; *Treinies* v. *Sunshine Mining Co.*, 308 U.S. 66, 60 S. Ct. 44, 84 L. Ed. 85. Here, Western Conference entered the state court to litigate the issue, among others, of the validity of the service of process upon one Ballew (or Ballou) as an agent of Western Conference. The state trial court, upon consideration of evidence which is neither before us nor was before the United States District Court, determined Ballew to be an agent of Western Conference and accordingly found a valid service of process upon Western Conference. This judgment was affirmed against direct attack in the Supreme Court of Utah. Had this issue originated in the United States District Court our present review would have concerned the evidence viewed by the federal trial court as demonstrating that no such agency existed. But we make no such review. On a similar contest of jurisdiction, the United States Supreme Court has held:

> "The substantial matter for determination is whether the judgment amounts to *res judicata* on the question of the jurisdiction of the court which rendered it over the person of the respondent. It is of no moment that the appearance was a special one expressly saving any submission to such jurisdiction. . . . The special appearance gives point to the fact that the respondent entered the

Missouri court for the very purpose of litigating the question of jurisdiction over its person. It has the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction . . . It had also the right to appeal from the decision of the Missouri District Court, . . . It elected to follow neither of those courses, but, after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted." Baldwin v. Iowa State Traveling Men's Association, 283 U.S. 522 at 524, 51 S. Ct. 517, 75 L. Ed. 1244.

We think it clear that the determination of the Utah court that it had jurisdiction over the person of Western Conference through the service of process upon one found to be an agent of Western Conference is res judicata of that issue. The necessity of examining the question of agency is often the pivotal point in determining jurisdiction of either person or subject matter and can and does form the premise of the doctrine of res judicata as between state and federal courts. In *McCarthy* v. *State, et al.*, 1 Utah 2d 205, 265 P. 2d 387, the Supreme Court of Utah applied the principle of finality of judgment where the federal court had earlier considered the claim of agency of state officers acting under the compulsion of a state statute. The federal court had dismissed the action because the named individual defendants were not the real parties in interest. Such ruling required a determination of agency and an interpretation of a state statute. The action was then filed in the state court and was dismissed as being res judicata. In affirming this dismissal the Utah Court stated:

"The issue was settled by the Federal Court, as herein-

above indicated, and it was not the prerogative of the State District Court nor of this Court on appeal to review or reverse that decision. Whether its judgment was right or wrong, it stands unassailed and is binding upon the parties. Any other view would create uncertainty by undermining the conclusive character of judgments and would permit the revival of litigation once terminated; consequences which it was the very purpose of the doctrine of res judicata to avoid."

Western Conference strenuously urges that it is not a labor organization within the bounds of that term as defined in the Labor-Management Act and that a determination to the contrary in a state court cannot be res judicata upon such an issue. The ruling does, of course, require a determination and application of fact to an interpretation of Sec. 2(5) of the Act and the correctness of such rulings is of utmost importance in the administration of the Act. But adequate protection against the frustration of federal law by unsound interpretation or application in state courts lies in the power of the Supreme Court of the United States to review by certiorari the judgments of state supreme courts upon matters of federal or constitutional law. In *Morris* v. *Alabama*, 294 U.S. 587, 55 S. Ct. 579, 79 L. Ed. 1074, the power and duty is recognized by Mr. Justice Hughes thus:

"That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a State court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are

so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."

In the instant case certiorari was sought and denied by the Supreme Court of the United States from the judgment of the Supreme Court of Utah. Such denial does not establish the correctness of the particular judgment but serves only to establish the finality of the judgment as between the particular parties. The same issue cannot be renewed by initiation of an action in the United States District Court.

Amici Curiae join Western Conference in arguing that it has now been admitted that the appellant company held no certificate of public convenience and necessity required by the Interstate Commerce Commission as a condition to doing business as an interstate contract carrier;[3]—that the evidence demonstrates that the appellant was operating an interstate trucking business without authority; and that for these reasons appellant should be denied enforcement of its judgment.

The Interstate Commerce Act does not provide for court action for violation of the provisions of that act, but does provide, 49 U.S.C.A. 13(1):

"(1) Any person, firm, corporation, company or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complain-

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[3] The opinion of the Supreme Court of Utah may indicate that that Court considered this point upon an erroneous assumption of fact. 329 P. 2d 414 at 420. If so, the proper remedy lay in urging the Utah Court to correct such error. We consider the contention only because from the record before us and the opinion of the Supreme Court of Utah we cannot clearly determine whether the Utah court considered and acted upon the issue.

ing of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

and, 49 U.S.C.A. 12(1):

"(1) The Commission shall have authority, in order to perform the duties and carry out the objects for which it was created, to inquire into and report on the management of the business of all common carriers subject to the provisions of this chapter, . . . The Commission is authorized and required to execute and enforce the provisions of this chapter; and, upon the request of the Commission, it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court . . . all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof. . . ."

It is clear that the matters of interstate transportation of goods were entrusted to the Commission by Congress and the role of the courts in the administration of the policies is limited to enforcing, enjoining, setting aside,

annulling or suspending orders of that body, 28 U.S.C.A. 1336, 28 U.S.C.A. 2321, 49 U.S.C.A. 16. The record here indicates that the Commission has licensed the appellant as a private carrier; no complaint of this action has been made to the Commission; and if damage arose as a result of improper licensing or improper use of the granted certificate, it is not apparent.

Appellee has not cited us to a case where such a defense was interposed in a court action sounding in tort, nor do we think such defense proper. The commission has the facilities and powers to investigate all such matters and is charged with the responsibility of administering the Act in all its facets. The courts may not usurp its power in the guise of determination of a civil suit.

Finally, Western Conference contends that it was deprived of the opportunity of defending, in full, the state court action because of extrinsic fraud perpetrated by the Company. This contention was presented to the state trial court by post-trial motion and was there rejected. It was also presented to the United States District Court and was similarly rejected. Fraud is within the doctrine of res judicata, Heiser v. Woodruff, 327 U.S. 726, 66 S. Ct. 853, 90 L. Ed. 970, and can serve as a premise to avoid a state court judgment only when it is presented to a federal court as an original issue. Here, even as an original issue, the claim was found to lack merit by the court below. We find no error in the finding.

Reversed and remanded with directions to vacate the injunction.

Judgment

Twelfth Day, July Term, Tuesday, August 22nd, 1961.

Before Honorable Orie L. Phillips, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Utah and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, that this cause be and the same is hereby remanded to the said district court with directions to vacate the injunction, and that Dairy Distributors, Inc., appellant, have and recover of and from Western Conference of Teamsters, appellee, its costs herein and have execution therefor.

Order denying appellee's petition for rehearing en banc

Seventh Day, September Term, Tuesday, October 3rd, 1961.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Orie L. Phillips, Honorable John C. Pickett, Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the petition of appellee for a rehearing en banc herein, and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

Order denying appellee's petition for rehearing

Seventh Day, September Term, Tuesday, October 3rd, 1961.

Before Honorable Orie L. Phillips, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the petition of appellee for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

(On October 14, 1961, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.)

APPENDIX "B"

No. 856. LOCAL UNION 976 *et al., Petitioners,* v. DAIRY DISTRIBUTORS, Inc. 360 US 909, 3 L ed 2d 1259, 79 S Ct 1294, June 15, 1959. Petition for *Writ of Certiorari* to the Supreme Court of Utah, denied.

Same case below, 8 Utah 2d 124, 329 P2d 414.

Herbert S. Thatcher and Clarence M. Beck, for petitioners.

Rex J. Hanson and Walter L. Budge, for respondent.

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APPENDIX C

CHAPTER 8.—INTERSTATE COMMERCE ACT, PART II; MOTOR CARRIERS

§ 303. Definitions and exceptions—Definitions

(a) As used in this chapter—

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(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation . . . under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

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§ 309. Contract carriers by motor vehicle—Permit to operate;

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(a) (1) Except as otherwise provided in this section and

in section 310a of this title, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business . . . The application for such permit shall be decided in accordance with the procedure provided for in subsection (b) of this section and such permit shall be issued or denied accordingly.

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Application for permit; form and contents; issuance of permit; terms and conditions

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 310 of this title, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit

would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 304(a) (2) and (6) of this title . . .

• • • • • • •

§322. Unlawful operation—Violation of chapter or rules or orders; pentlty where none *otherwise* provided.

(a) Any person knowingly and willfully violating any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not less than $100 nor more than $500 for the first offense and not less than $200 nor more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense.

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Participation in unjust discrimination; evasion of regulations; penalty

(c) Any person, whether carrier, shipper, consignee, or broker, or any officer, employee, agent, or representative thereof, who shall knowingly offer, grant, or give, or

solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this chapter, or who by means of any false statement or representation, or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, shall knowingly and willfully assist, suffer or permit any person or persons, natural or artificial, to obtain transportation of passengers or property subject to this chapter for less than the applicable rate, fare, or charge, or who shall knowingly and willfully by any such means or otherwise fraudulently seek to evade or defeat regulation as in this chapter provided for motor carrier or brokers, shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not less than $200 nor more than $500 for the first offense and not less than $250 nor more than $2,000 for any subsequent offense. As amended Aug. 14, 1957, Pub. L. 85-135, § 4, 71 Stat. 352.

LABOR MANAGEMENT RELATIONS ACT, AS AMENDED[1]

BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

SEC. 303. (a) It shall be unlawful, for the purpose[s] of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, [or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—]

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[1] Portions of the Act which have been eliminated by the Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257, are enclosed by brackets; provisions which have been added to the Act are in italics; and unchanged portions are shown in roman type.

[(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person:]

[(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act:]

[(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act:]

[(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.]

any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

• • • • • • •

SUITS BY AND AGAINST LABOR ORGANIZATIONS

SEC. 301.

• • • • • • •

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

• • • • • • •

DEFINITIONS

SEC 2. When used in this Act—

• • • • • • •

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and

which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

Case No. 642

WESTERN CONFERENCE OF TEAMSTERS,
Petitioner,

vs.

DAIRY DISTRIBUTORS, INC.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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vs.

DAIRY DISTRIBUTORS, INC.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion in the case of the United States Court of Appeals for the Tenth Circuit is reported at 294 F. 2d 348, and a copy of that opinion is included in the Appendix of petitioner's brief. The opinion of the United States District Court is unreported. The opinion in this case of the Supreme Court of Utah is reported at 329 P. 2d 414, and a copy of that opinion is attached to this brief as Appendix "A".

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this court upon the provisions of Title 28, Section 1254(1) of the United States Code.

QUESTIONS PRESENTED

1. Whether the doctrine of res judicata bars a Federal District Court from enjoining the respondent (Dairy Distributors, Inc.) from enforcing a state court judgment as against petitioner (Western Conference of Teamsters) rendered under Section 303 of the Labor Management Relations Act because of a claimed misinterpretation of the Act.

2. Whether a Federal District Court is bound under the doctrine of res judicata by the previous judicial determination of the nature of respondent's business.

STATUTES INVOLVED

Section 303 of the Labor Management Relations Act, designated at Title 29, Section 187, U.S.C.A.:

> "(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services, where an object there of is —
> "(1) forcing or requiring any employer or self-employed person to join any labor or em-

ployer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having the jurisdiction of the parties, and shall recover the damages by him sustained and the cost of suit. June 23, 1947, 3:17 p.m. E.D.T., c. 120, Title III, Para. 303, 61 Stat. 158."

Title 29, Section 185(e), U.S.C.A., which reads as follows:

"For the purpose of this section and in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed where actually authorized or subsequently ratified shall not be controlling."

STATEMENT

A. Factual Background

The respondent, Dairy Distributors, Inc., is a Utah corporation owned by the Edwin Gossner family.

The company was formed for the principal purpose of marketing the cheese produced by Cache Valley Dairymen's Association, Smithfield, Utah. The company carried only those goods which were purchased and owned by the respondent (R. 111). It had been licensed by the Interstate Commerce Commission office at Salt Lake City, Utah, as a private carrier (Opinion of Appeal Court for the Tenth Circuit, 294 F. 2d, 348, 353).

Dairy Distributor's principal source of income was from business transacted with Dorman and Company of New York City, a wholesale cheese dealer (R. 264). The respondent company then purchased commodities in the Eastern United States and carried them back to Utah (R. 263).

In an effort to obtain a new bargaining agreement with the employees of Cache Valley Dairy Association, the representatives of Local 976, Joint Council 67, and the petitioner went to New York and there with the aid of New York Local 277, whose members worked for M. Dorman and Company, urged the latter company to cease dealing with the Dairy Distributors, Inc. On July 26, 1955, and on two subsequent occasions, representatives of Local 976 and the petitioner picketed the trucks of Dairy Distributors, Inc., at Dorman's loading platform in New York City (R. 223-227). As a result of these incidents, which induced Dorman to cease doing business with the respondent, the latter company was forced out of business. Litigation and the judgment from which petitioner seeks relief resulted.

B. State Court Proceedings

A review of the course of the original litigation is necessary for a proper understanding of the nature of the relief which the petitioner seeks.

The course of the litigation in the state courts is as follows:

1. The action was originally filed in the Third District Court in and for Salt Lake County, Utah, and was an action for damages pursuant to the Taft-Hartley Act.

2. Prior to trial, a Motion to Dismiss was filed on behalf of the Western Conference of Teamsters (petitioners in this action), one of the defendants in the state court action, attacking the jurisdiction of the trial court (R. 30). This motion was heard by one of the divisions of the Third District Court and was denied.

3. The case was tried in the Third District Court in and for Salt Lake County, Utah, and resulted in a verdict and judgment against the defendant therein, the petitioner here, and other defendants, and a judgment was entered upon a jury verdict (R. 240). In the answer of Western Conference of Teamsters, defendants in the original action and petitioner here, the question of the Court's jurisdiction was raised asserting that the Western Conference of Teamsters was not subject to the service of process of the state court (R. 237, 230). At the end of the plaintiff's case in the state court action, a Motion to Dismiss upon

the same ground presented in this petition that the Western Conference of Teamsters was not the kind of organization which could be sued under the provisions of the Taft-Hartley Act, was argued to the trial judge and denied.

4. An appeal was taken by the Western Conference of Teamsters and other defendants to the Supreme Court of Utah. The points raised upon appeal by the Appellants, including petitioners, in the Supreme Court of Utah (R. 35, 36 and 37) were as follows:

a. The adequacy and effectiveness of service on the defendants.

b. Whether the Western Conference of Teamsters was the kind of organization which could be sued for damages under the Taft-Hartley Act.

c. The alleged violation of the Interstate Commerce Act by the plaintiff in the state action, Dairy Distributor's, Inc.

The Supreme Court of Utah held against the Western Conference of Teamsters and other defendants and affirmed the judgment. The opinion of the Utah Supreme Court is found at Pages 221 to 232, inclusive of the record, and is set forth in the Appendix of this brief.

5. The defendants in the state court action, including the Western Conference of Teamsters, petitioned the Supreme Court of Utah for a re-hearing (R. 38 & 39). The points raised in the Petition for Re-hearing were among those raised on the original

appeal. The Supreme Court of Utah denied a re-hearing.

6. The defendants then, including the Western Conference of Teamsters, petitioned the Supreme Court of the United States for a Writ of Certiorari raising among other things the following points:

(a). The Western Conference of Teamsters could not be sued under the provisions of the Taft-Hartley Act.

(b). That the plaintiff had illegally operated his business in violation of the Interstate Commerce Act.

7. The Petition for Writ of Certiorari was denied by this Court, June 15, 1959, *Local Union 976 et al, petitioners, v. Dairy Distributors, Inc. No. 856*, 360 U.S. 909, 3 L. Ed. 2d 1259, 79 Sup. Ct. 1294.

The foregoing is a summary of the course the litigation took in the courts of the State of Utah and on petition for a Writ of Certiorari to the Supreme Court of the United States.

C. Federal Court Proceedings

1. The action in the United States District Court for the District of Utah, Central Division, was commenced by the Western Conference of Teamsters, Petitioner, only and not by the other defendants. The petition sought to enjoin the enforcement of the state court judgment against the Western Conference of Teamsters by Dairy Distributors, Incorporated.

Among other points raised by the petition in the United States Court were the following:

(a). That the petitioner, Western Conference of Teamsters, was not the sort of labor organization which could be sued under the provisions of the Taft-Hartley Act.

(b). That no proper service of process was effected in the State of Utah and therefore the state court did not acquire jurisdiction over the petitioner, Western Conference of Teamsters.

(c). That the defendant in the United States Court action, Dairy Distributors, Incorporated, was engaged in an illegal business without proper authority from the Interstate Commerce Commission and, therefore, not entitled to recover (R. 43 & 44).

It thus appears that the matters presented for determination by the United States Court had been raised by the Western Conference of Teamsters in the state court proceeding, and were litigated and decided against said Petitioner at every stage of those proceedings.

2. At the onset of the trial in the United States Court, Respondent (Dairy Distributor's Incorporated), renewed its previous Motion to Dismiss (R. 53) and further objected to the introduction of any testimony upon the same ground urged in support of a Motion to Dismiss and an earlier Motion for Summary Judgment (R. 51).

3. At the conclusion of the trial, the matter was taken under advisement by the trial judge. Thereafter, on June 25, 1960, the trial judge made an oral ruling

which is set forth in the record (R. 141) and found the issues in favor of the Western Conference of Teamsters, Petitioner, and against Dairy Distributor's, Incorporated.

4. Based upon the findings and conclusions finally adopted by the trial judge, an Order was issued permanently enjoining the defendant, Dairy Distributor's, Incorporated, from enforcing the state court judgment against the Western Conference of Teamsters, Petitioner.

5. Thereafter, appeal was had to the Circuit Court of Appeals for the Tenth Circuit and the opinion of the Tenth Circuit Court is reported at 294 F. 2d 348, and is also set forth in the Appendix of appellant's brief, wherein the Federal District Court judgment was reversed and remanded with directions to vacate the injunction. Thereafter, a Petition for rehearing was denied by the Circuit Court en banc October 3, 1961, and this Petition followed.

ARGUMENT

I.

THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT PROPERLY HELD THAT THE DOCTRINE OF RES JUDICATA BARRED THE FEDERAL DISTRICT COURT FROM ENJOINING THE RESPONDENT FROM ENFORCING A STATE COURT JUDGMENT AS AGAINST THE PETITIONER.

All issues raised by the petitioner have been passed upon and adjudicated by the Third District Court of the State of Utah, the Supreme Court of

Utah, and resolved against the petitioner. The relief sought by the petitioner in the United States District Court required it to sit as an appellate court, and it was without jurisdiction to entertain or hear any proceedings pertaining to the same. Further, the acquisition of jurisdiction of the petitioner by the Utah Trial Court was raised, litigated and resolved against the petitioner at every stage of the proceedings in the state courts. The same applies with respect to the petitioner's present contention that the State Court misapplied the federal law in asserting jurisdiction over the petitioner. To permit a Federal District Court to relitigate these issues would allow a dissatisfied litigant having tried his lawsuit in the state court system, to petition the United States District Court for an Order enjoining the enforcement of the Judgment, and to begin the litigation all over again in the federal system in the hope of obtaining a more favorable result.

In support of the foregoing propositions of law, attention is invited to the case of *American Surety Company of New York* vs. *Baldwin*, 287 U. S. 156, 166, 169, 53 Sup. Ct. 98, 77 L. Ed. 231 (1932). In that case an action was filed in the U. S. District Court of Idaho for an injunction against the defendant as the sheriff of Ada County, Idaho, to enjoin him from enforcing a state court judgment.

The United States District Judge held that the Idaho Court had made a mistake in construing a contract, but further held that the state court had juris-

diction of the subject matter and the parties, and that the judgment entered was not void and should not be interferred with by the United States Court.

The Ninth Circuit Court of Appeals reversed the decision of the United States trial judge. This Court reversed the Ninth Circuit affirming the decision of the trial judge. The opinion in that case written by Mr. Justice Brandeis says as follows:

> "The principles of res judicata apply to questions of jurisdiction as well as to other issues. They are given affect even where the proceedings in the federal court is to enjoin the enforcement of a state judgment, if the issue was made open to litigation in the original action or was determined in an independent proceeding in the state courts."

The opinion of Justice Brandeis further states:

> "The full faith and credit clause, together with legislation pursuant thereto, applies to judicial proceeding of a state court drawn in question in an independent proceeding in the federal courts. (U.S.C. 28 paragraph 687, *Mutual Life Insurance* vs. *Harris*, 97 U. S. 331, 24 L. Ed. 559 (1877))."

The opinion continues:

> "Federal claims are not to be prosecuted piece meal in state and federal courts, whether the attempt to do so springs from a failure reasonably to adduce relevant facts, . . . or from a failure seasonably to pursue the appropriate state remedy."

The case of *Baldwin* vs. *Traveling Men's Association*, 283 U. S 522, 51 Sup. Ct. 517, 75 L. Ed. 1244

(1930), is also relied upon by respondent. Plaintiff recovered judgment against the defendant in the United States Court for the Western District of Missouri. Thereafter, the defendant attacked the judgment in the United States Court for the Sourthern District of Iowa, claiming among other things that the defendant was not properly within the jurisdiction of the Missouri Court although the defendant twice appeared in the original action and contested jurisdiction. In holding that the earlier judgment was res judicata on the question of jurisdiction, this court struck down the collateral attack in the following language:

> "Public policy dictates that there be an end of litigation; that issues tested shall be bound by the result of the contest and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard and why he should not in the absence of fraud be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

The case of *Forsyth* vs. *Hammond*, 166 U. S. 506, 517, 17 Sup. Ct. 665, 41 L. Ed. 1095 (1895), has striking similarities to the one under consideration. There, the City of Hammond, Indiana, sought to include within its limits some property belonging to Forsyth. After a trial in the Indiana State Court, the rights of the city to annex the property were upheld. Forsyth was a party to those proceedings. This decision was ap-

pealed by Forsyth and others to the Supreme Court of Indiana and the trial court was affirmed.

A bill was then filed by Forsyth in the United States District Court to enjoin the collection of taxes. The United States Court dismissed the bill, but the United States Circuit Court for the Seventh Circuit reversed the District Court, and the City of Hammond appealed to this tribunal, which reversed the decision of the Court of Appeals for the Seventh Circuit.

Of importance concerning the application of the doctrine of res judicata to state determinations of jurisdiction is the following language from that opinion:

> "But after an adverse decree, she insisted that it was not only erroneous but void, and voluntarily commenced an action in the Supreme Court of the State to have that claim established. She invoked the jurisdiction of that court. She summoned the City of Hammond into that forum and there challenged the decree of the Circuit Court, challenged it for error and also for lack of jurisdiction. The questions, both of error and of jurisdiction, were certainly judicial in their nature and questions within the undoubted cognizance of the Supreme Court. She voluntarily sought its judgment. Can she, after its decision, be heard in any other tribunal to collaterally deny the validity thereof? Does not the principal res judicata apply in all its force? Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? The question is not whether the judgment of the Supreme Court would be conclusive as to the question involved in another

> action between the parties, but whether it is not binding between the same parties in that or any other form. The principals controlling the doctrine of res judicata have been so often announced, and are so universally recognized, that the citation of authorities is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent action."

The decision then quotes in support the following cases: *Cromwell* vs. *Sac County*, 94 U. S. 351, 24 L. Ed. 195 (1877); *Mason Lumber Company* vs. *Buchtel*, 101 U. S. 638, 25 L. Ed. 1073 (1879); *Stout* vs. *Lye*, 103 U. S. 66, 26 L. Ed. 428 (1880); *Nesbitt* vs. *Riverside Independent District*, 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562 (1891); *Johnson Company* vs. *Wharton*, 152 U. S. 252, 14 Sup. Ct. 608, 38 L. Ed. 429 (1893); *Last Chance Mining Company* vs. *Tyler Mining Company*, 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859 (1894).

The more recent opinions of this Court also support respondent's contention, of which *Scherer* vs. *Scherer*, 334 U. S. 343, 349-350, 68 Sup. Ct. 1087, 92 L. Ed. 1429 (1948), is representative. The following language is quoted from that opinion which sustained a Florida State Court's determination of jurisdiction against collateral attack in Massachusetts.

> "The question of what affect is to be given to an adjudication by a court that it possess requisite jurisdiction in the case, where the judgment of the court is subsequently subjected to

> collateral attack on jurisdictional grounds has been given frequent consideration by this court over a period of many years. Insofar as cases originating in the Federal Courts are concerned, the rule has evolved that the doctrine of res judicata applies to adjudications relating either to jurisdiction of the person or of the subject matter, where such adjudications have been made in proceedings in which those questions were in issue and in which the parties were given full opportunity to litigate.
>
> "The reasons for this doctrine have frequently been stated. Thus, in *Stoll* vs. *Gottlieb*, 305 U. S. 165, 172, 59 Sup. Ct. 134, 83 L. Ed. 104 (1938), it was said:
>
> 'Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin the litigation. After a party has his day in court with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to the jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.' "

The opinion further says:

> "This court has also held that the doctrine of *res judicata* must be applied to questions of jurisdiction in cases arising in state courts involving the application of the full faith and credit clause, where, under the law of the state in which the original judgment was rendered such adjudications are not susceptible to collateral attack."

The petitioner seeks to avoid application of the

doctrine of res judicata claiming that public policy requires it. This contention is based upon certain cases cited in its brief at Pages 14 and 15. However, as will appear, those cases do not support such a broad proposition and are clearly distinguishable from the case under consideration.

In the case of *Kalb* vs. *Feuersteine*, 308 U. S. 433, 439, 440, 60 Sup. Ct. 343, 84 L. Ed. 370, (1940), this court held that a Wisconsin County Court did not have jurisdiction to foreclose a mortgage while a petition was pending in the Federal Court under the bankruptcy (Frazier-Lemke) act. The acts of the state court were declared to be "nullities" and "subject to collateral attack". The language of Mr. Justice Black writing for this Court reads:

> "The constitution grants Congress exclusive power to regulate bankruptcy and under this power, Congress can limit the jurisdiction which courts, state or federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law."
>
> * * *
>
> "We think the language and the broad policy of the Frazier-Lemke Act conclusively demonstrates that Congress intends to, and did deprive Wisconsin County Court of the power and jurisdiction to continue or maintain in any manner the foreclosure proceedings against appellants without the consent after hearing of the bankruptcy court in which the farmer's petition was then pending."

The Frazier-Lemke Act specifically withdrew jurisdiction from the state courts and any proceedings

in contravention of that Act were "nullities". This is in contrast to the Taft Hartley Act under which jurisdiction was specifically granted to both federal and state courts, and under which the course of litigation in the State Courts in this case proceeded.

In *United States* vs. *U. S. Fidelity Company*, 309 U. S. 506, 512, 513, 60 Sup. Ct. 653, 84 L. Ed. 894, (1940), cited by Petitioner, a federal statute which prohibited cross-claims against the United States also included certain Indian nations involved in litigation. In holding that a Missouri Federal District Court decision did not bar a subsequent action filed on behalf of the Indian nations in the Mississippi Federal District Court, this Court stated:

> "We are of the view, however, that *the Missouri judgment is void* insofar as it undertakes to fix a credit against the Indian nations . . . No statutory authority granted jurisdiction to the Missouri court to adjudicate a cross claim against the United States."

The Court continued with the following language:

> "The reasons for the conclusion that this immunity may not be waived governed likewise the questions of res judicata. As no appeal was taken from this Missouri judgment, *it is subject to collateral attack only if void.* It has heretofore been shown that the suability of the United States and the Indian nations, whether directly or by crossaction, depends upon affirmative statutory authority. *Consent alone gives jurisdiction to a judge against the sovereign. Absent that consent, the attempted exercise of the judicial power is void . . . Public policy forbids the suit unless consent is given, as clearly as public*

policy makes jurisdiction exclusive by declaration of the legislative body." (Emphasis added)

This case does not support the proposition urged upon this court by the petitioner. By congressional act, jurisdiction to entertain a suit by the state court had been specifically withdrawn and any proceeding in violation of that injunction was void and subject to collateral attack. In the present case, the Utah State Courts proceeded under specific authorization of Section 301 of the Labor Management Relations Act.

Again in the case of *Denver Building and Construction Trade Council* vs. *National Labor Relations Board*, 186 F. 2d 326 (1950), cited by petitioner, the doctrine of res judicata was held not to defeat a statutory "method devised by Congress" of pursuing a remedy. No such issue is presented in this case.

It is submitted that no issue was presented to the Federal District Court in the Petition for Injunctive Relief which had not theretofore been raised and decided against the petitioner at every stage of the proceeding, and the doctrine of res judicata bars consideration of those issues. and every other issue petitioner had an opportunity to raise in the original proceeding. *Chicot County Drainage District* vs. *Baxter State Bank*, 308 U. S. 371, 60 Sup. Ct. 317, 84 L. Ed. 329, (1940).

Notwithstanding, the contention of the petitioner, it is respondent's further contention that based upon the record made in the trial conducted before the United States District Court that the trial judge should have concluded that jurisdiction of the Western

Conference of Teamsters was acquired originally by the Utah State Court and that it was a labor organization within the meaning of the Taft-Hartley Act and, therefore, subject to suit as such under the provisions of that Act in the state court. With the jurisdiction conferred upon the state court under Section 301 of the Labor Management Relations Act, there was impliedly granted the right to interpret the Act.

Misapplication or misinterpretation of the Act is not a sufficient basis upon which to collaterally attack the judgment of the state court. A successful collateral attack, as observed from the cases cited above, can only be sustained where the judgment is void. No such contention is or can be made in the present case. Adequate protection against claimed inconsistent federal and state interpretations or applications lies in the power of this court to review by certiorari the judgments of the State Supreme Court. A petition has previously been made to this court for a Writ of Certiorari to the Supreme Court of Utah and denied, in which this petitioner sought to have the identical questions which it now seeks to have again reviewed, brought before this Court. Language taken from petitioner's initial Petition for Writ of Certiorari to the Supreme Court of Utah, reads as follows:

> "It is apparent that the court below had greviously applied Section 301(e) to impute responsibility to the Western Conference . . . and further has ignored the decision of this court as well as other federal courts applying rules of agency both at common law and under the Taft-Hartley Act." (Page 17)

Again, the petitioner asserted in his brief:

> ". . . the court (Supreme Court of Utah) below has . . . construed and applied a Federal Act in an erroneous manner and in disregard of applicable decisions of this and of other federal courts, so as to require correction here . . ."
>
> * * *
>
> "The issues presented in this case can be resolved only by this court, and any error in the court below in applying the federal law can be corrected only by this court." (Page 13)

It is respectfully submitted on the law and authority cited above, that the petitioner has previously exhaused its right of review and the doctrine of res judicata bars further action concerning this matter in the Federal District Court, and the opinion of the Circuit Court for the Tenth Circuit to that effect should stand.

II.

A FEDERAL DISTRICT COURT IS BOUND UNDER THE DOCTRINE OF RES JUDICATA BY THE PREVIOUS JUDICIAL DETERMINATION OF THE NATURE OF RESPONDENT'S BUSINESS.

The argument relative to the applicability of the doctrine of res judicata as set forth above, applies with equal force and effect to the state court's determination that respondent was not operating in violation of the Interstate Commerce Act (49 U.S.C. 1, et seq.). Nevertheless, petitioner asserts that the Federal District Court had jurisdiction to make a redetermination of this issue even after appellate procedures in the state court proceedings had been exhaused. The petitioner, ignoring the state court record concern-

ing this issue represents to this Court that the evidence introduced in the Federal District Court "proved that respondent operated as a 'contract carrier' and respondent admitted that it did so without an I.C.C. permit" (Petitioner's brief, p. 19). The record is contrary to this bold assertion. Respondent was a private carrier and conducted its affairs accordingly, and has never admitted that it operated as a contract carrier. Based upon the present record the Appeal Court for the Tenth Circuit found:

> "The record here indicates that the Commission has licensed the appellant (respondent here) as a private carrier; no complaint of this action has been made to the Commission; and if damage arose as a result of improper licensing or improper use of the granted certificate, it is not apparent." (294 F. 2d 348, 353).

Further, even if said violations were found to have existed the Interstate Commerce Act does not provide for a defense, sounding in tort, for violations of the provisions of the Act. The enforcement and sanctions stated in the Act are left to the exclusive control of the Commission. (49 U.S.C. § 12(1), 13(1), 16, 28 U.S.C. § 2321).

In any event, a factual question was presented at the trial in the state court concerning the alleged illegal operation of respondent. The jury and the trial judge rejected the contention of claimed illegal operation as did the Supreme Court of Utah. In addition, this Court in reviewing a Petition for Writ of Certiorari to the Supreme Court of Utah, impliedly re-

jected the same claim. That allegation as it appeared in the original Petition at page 3, reads as follows:

> "(4) The Court wrongfully applied federal law under the Interstate Commerce Act thereby depriving petitioners of the defense that respondent, illegally operating without an I.C.C. permit, could not recover . . ."

With the denial of that writ, petitioner's right to further review ended.

Concerning the power and duty of this Court to review on appeal, factual matters as well as legal questions, the following language of Mr. Justice Hughes, speaking for the Court in *Norris* v. *Alabama*, 294 U. S. 587, 589, 55 Sup. Ct. 579 (1935), is pertinent:

> "That the question is one of fact does not relieve us of the duty to determine whether in truth the federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms, but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and finding of fact, are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."

The United States Court of Appeals for the Tenth Circuit correctly observed that:

> ". . . Adequate protection against the frustration of federal law by unsound interpretation or application in state courts lies in the power of the Supreme Court of the United States to review by certiorari the judgments of state supreme court upon matters of federal or constitutional law." (294 F. 2d 348, 352)

But petitioner contends that the policy of the United States cannot be disregarded by the states. This is conceded. However, there is no showing here that such a policy has been ignored by the state courts. A finding of fact concerning this issue of the lawsuit was made and petitioner thereafter urged its disagreement with that finding upon every court judicial procedure would permit. Surely, a private disagreement with an affirmed judicial finding cannot be considered a contravention of the policy of the United States or a matter with which this court should be concerned.

From the very start of this litigation, petitioner has asserted the claim of illegality of respondent's business. The conclusion is inescapable that petitioner has never been able to prove the facts upon which the claim of illegality must rest.

Stripped of all the verbiage in which petitioner dresses that claim, its naked contention is that by merely reasserting the claim, this Court is required to review it.

The most charitable appraisal of petitioner's approach reveals it would like to persuade this Court that because factual issues, fairly contested, were al

ways decided against petitioner, there has been a subversion of federal policy.

Mere inconsistency in application of a federal statute, if such were found to exist, is not a sufficient basis upon which the relief of this court can be invoked. In the case of *Chicot County Drainage District v. Baxter State Bank*, 308 U. S. 371, 376, 84 L. Ed. 329, 60 Sup. Ct. 317 (1940), a bondholder was held bound by an adjudication made under the Municipal-Debt Readjustment Act of 1934, from which no appeal was taken, even though the same Act was held unconstitutional by this Court in another case. Mr. Chief Justice Hughes speaking of the trial court's decision wrote as follows:

> "Their determinations of such questions, while open to direct review, may not be assailed collaterally."

CONCLUSION

It is respectfully submitted that, for the reasons asserted above, the Petition for a Writ of Certiorari should be denied.

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APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF UTAH

No. 8823

DAIRY DISTRIBUTORS, INC.
PLAINTIFF AND RESPONDENT,

v.

LOCAL UNION 976, JOINT COUNCIL 67, WESTERN CONFERENCE OF TEAMSTERS, THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, ET AL.,
DEFENDANTS AND APPELLANTS.

HENROID, Justice:

Appeal from a judgment entered on a verdict in favor of plaintiff in a case having to do with Title 29, Sec. 187 United States Code Annotated (Sec. 303, Labor Management Relations Act; June 23, 1947, c. 120, Title III, Sec. 303, 61 Stat. 158).[1] Affirmed. Costs to plaintiff.

Defendants at some length have abstracted the evidence of the rather voluminous record. Understandably they have recited facts properly presentable to a

[1] "(a) It shall be unlawful, for the purpose of this section only in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles materials, or commodities or to perform any services, where an object thereof is—

"(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title."

jury that include those appearing most favorable to their own contentions. However, as we have indicated many times, in reviewing the facts in a case like this, we must do so in a light that most strongly supports the verdict, and we must go along with the verdict unless it clearly is not supported by any substantial evidence.

We believe the following to be a fair recital of such facts that the jury well may have believed to be true:

Prior to 1950, at Amalga, Utah, a co-operative association of milk producers, Cache Valley Dairymen's Association, managed by one Gossner, manufactured and distributed cheese over a wide area, including east and west coast points. Principal customer was Dorman & Co., New York City. In 1950 the Utah-Idaho Central Railroad discontinued business, and as a result the Association lost its railhead. Use of other railroads made competition with Wisconsin cheese in the New York area prohibitive. Under our statutes and the Association's articles, it could not operate a transportation business. Without a back haul from the east, the Association could not have competed, with its own equipment, in the New York market. It was suggested, therefore, that Gossner form a trucking company, which he and his immediate family and one other did, incorporating the plaintiff, Dairy Distributors. This corporation purchased cheese from the Association, shipped and sold it to Dorman in New York, purchasing back haul commodities there (principally calcium chlorite) for resale here.

The Association and the Corporation were separate businesses, created for different purposes, and having different shareholders. The operations of each inured to the benefit of two different groups of people. Counsel for defendants seems to have conceded all this when, objecting to the introduction of a letter addressed to the Association, he observed that the Association was "not this Dairy Distributors at all—it is a different company."

The plaintiff Corporation had an annual $1,500,000 gross operation from September, 1952, to the latter part of July, 1955, enjoying a monthly profit of about $1,000, and acquiring assets of about $50,000. During this period, plaintiff constantly had one truck headed for Dorman's with a $12,000 cargo of perishable cheese, and one headed west with a back haul. Plaintiff had experienced no labor trouble whatsoever with defendants, although the Association had. Local 976 had been signatory to a contract with the Association, but upon its termination, negotiations for renewal at increased wages failed. Thereafter the union suspended all of its members working for the Association for failure to cooperate with the union. It later took the position such employees were no longer members of the union, as is reflected in the banner (see cut) employed on a picket line that proved to become a vital link in the chain of events culminating in this litigation.

Since the Association and the plaintiff Corporation were separate entities and businesses, the labor problems of the Association do not appear to us to be

germane to the issues here, save as they constitute an historical, causative backdrop leading to the picketing of Dorman and plaintiff's equipment, resulting in the discontinuance of plaintiff's shipments to the former.

In May, 1955, one Rash, Secretary-Treasurer of Local 976, accompanied by one Ballew, troubleshooter loaned by a Seattle labor agency to assist Local 976 in its negotiations with the Association, went to New York to see one of the Dormans. They enlisted the aid of one Ristuccia, Secretary-Treasurer of New York Local Teamster Union 277 that represented Dorman's employees, in making the approach. The conceded purpose of the visit was to urge Dorman to pressure the Association into bargaining with Local 976, and in aid thereof to urge Dorman to refuse acceptance of any more cheese manufactured by the Association.

On July 26, 1955, a load of plaintiff's cheese arrived at Dorman's dock early in the morning, as did Local 976's representatives. Rash, Ballew and one Lott. Mr. Rosen, member of the New York Teamsters' Local and Dorman's foreman, having been advised that his union had sanctioned the picketing refused to unload the shipment. A picket banner appeared and Dorman's establishment and plaintiff's truck were picketed by Rash and Lott, and the cheese was not unloaded until five o'clock the same day. Dorman contacted Gossner in Utah and advised him that there was a picket line in front of his place of business picketing Dairy Distributors' truck, advising that his employees would not cross the picket line and did not want to unload the cheese.

The subjoined snapshot shows the picket banner and the wording used thereon.

Plaintiff shipped no more cheese to Dorman's until about six weeks later, on September 7, when Rosen told the driver the cheese could not be unloaded until the Dormans arrived. The Dormans advised him that the union would have to be contacted. Following such contact, he was told that the union would not permit the unloading. The cheese was not unloaded but was taken elsewhere and placed in storage.

Plaintiff made one more attempt to ship cheese to Dorman's about two months later, on October 31, 1955, when the plaintiff's equipment again was picketed. Plaintiff's truckdriver stated that the truck was unloaded "by Dormans and myself and a couple of Dorman boys." Plaintiff made no effort thereafter to sell cheese to Dorman's but liquidated its trucking business, a result caused by the picketing and interference with plaintiff's business dealings with Dorman. It had been made clear that Dorman's place of business and the plaintiff's equipment would be the subject of continued picketing whenever it was deemed advisable to foster the union's cause.

Under such circumstances it would not seem to be unreasonable for the jury to conclude that defendants, in violation of the act, induced and encouraged Dorman *and* its employees to refuse to use, process or otherwise handle or work on the commodities of the plaintiff with the objects of 1) forcing Dorman's to cease doing business with any other person and 2) forcing the Association to bargain with the union.

We think the believable facts in this case reasonably and successfully challenge the contention of defendant's Point I and its subdivisions, which are to the effect that: Plaintiff failed to show the essential element making compensable a violation of the act; A. Because it 1) did not show an appeal to Dorman's non-supervisory employees, 2) who, they say, were influenced only by their employers, 3) who, in turn were the only ones appealed to by the union; B. Because it failed to show a statutory object sought by the picketing; C. Although Local 976 was not certified as bargaining agent for the Association's employees, it enjoyed a status tantamount thereto; and D. Because it failed to show an unlawful attempt by defendants to accomplish a statutory object.

Touching on some of the subdivisions of Point I, we are not convinced by the arguments of counsel for defendants relating to an equivalence of certification in the light of the facts that 1) the union had suspended its members employed by the Association, for lack of cooperation with the union which now claims to be their bargaining agent;2) the picket banner employed, itself negatived the idea that the union was bargaining agent by clearly branding the Association's employees as "non-union" (see cut); and anyway, 3) the union's activity was at the Dorman's place of business and alongside plaintiff's truck, certification as to the Association's employees having nothing to do with the issues involved here.

To argue that certification or its equivalent had something to do with this case would be to assume that

the Association, not the plaintiff, delivered the cheese to Dorman's in New York. The concession of defendants that the Association and the plaintiff Corporation were independent organizations, supported by substantial evidence in the record, does away with any such assumption and disposes not only of the defendants' suggestion to the contrary, but of any necessity to discuss ambulatory picketing and alter ego matters, or the authorities presented by either side in support thereof.

As to the matter of who was induced to act, we cannot agree with defendants that there was no evidence of any appeal or inducement directed to non-supervisory employees to refuse to unload or handle the plaintiff's commodities, because the union representatives talked only to the Dormans and the foreman Rosen. To contend so is to challenge the silent potency of a peaceful picket line, and is to ignore the very purpose of such a line: Persuasion. It is to blind oneself to the words of the picket banner, with its pointed suggestion that loyal union members (Dorman's was a union establishment) should not handle the cheese. Further, it would seem to give little credit to the understanding and reaction of Dorman's union employees by intimating that only the conversations of Rash and the others with Dorman and Rosen, and not the presence of or the suggestiveness of the picket banner, had anything to do with the refusal to handle the cheese and the subsequent demise of a profitable business. The cold facts are that after enjoying congenial and profitable business relations with Dorman's for more

than two years, with deliveries of cheese at least once a week, the first picketing by the union agents ended all that, and in three and a half months thereafter plaintiff attempted but two shipments, the first being refused, requiring storage, and the second being picketed. Coupled with these facts, Dorman had advised the Association that his men would not cross the picket line and did not want to unload the cheese. It is not reasonable to believe that this course of events would have occurred without the picketing, and it is difficult to understand why the union would engage in this picketing if it were not designed to appeal to and influence the employees. We believe the jury, contrary to the contentions of defendants, reasonably could have found that the picket line 1) *did* appeal to the employees, and that 2) the Dormans *were* expressing the feeling and intentions of the employees when they announced that their men would not cross the picket line and would not unload cheese processed by the Association, and 3) that because the employees indicated they would not cross the picket line, plaintiff's relations with Dorman's as a practical matter, were terminated.

Defendants' Point II contends that the Western Conference of Teamsters is exempt from this litigation, not being a labor organization within the contemplation of Title 29, Sec. 152 (5) U.S.C.A.[2] There is evidence in the record to indicate that Western Con-

[2] "The term 'labor organization' means any organization of any kind or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

ference of Teamsters had jurisdiction over local teamster unions in the 11 western states; the Local 976, of which Rash was an officer, was affiliated with the Western Conference, and that it in turn was affiliated with the International Union. Under such circumstances we cannot say that the Western Conference of Teamsters was not a labor arganization under the broad definition of the act.

The facts hereinabove mentioned, together with the facts that defendants' answer admitted that Local 976 of which Rash was an officer and Joint Council 67 engaged in picketing, the trustees for Local 976 apparently was appointed by the International Union and that Local 976 members paid part of their dues to the International, seem to dispose of defendants' Point III and IV having to do with the contention that the Western Conference and the International were strangers to this action for lack of a principal-agent relationship. We think a factual ussue was precipitated such that we cannot say as a matter of law no agency existed.

We are not unmindful of the administrative pronouncements cited by defendants relating to agency, nor the general proposition that agency must be shown by him who asserts it. We feel that a jury reasonably could have concluded that plaintiff sustained its burden of proving agency and we choose to go along with plaintiff's cited authorities, insofar as the facts of the instant case are concerned, and also to assert that agency, provable circumstantially, has taken on a

meaning under the Taft-Hartley Act that includes ostensible authority, a matter not included within the Wagner Act.[3]

In the Ninth Circuit decision[4] involving the same legislation as we have here, the court, after referring to Title 29, Sec. 185 (e),[5] stated:

> "Probably the practical result of the section in the case of labor unions was to restore the general rules of agency, particularly the rules of apparent authority which had been curtailed by the Wagner Act . . . and the decision of the United Brotherhood of Carpenters * * * v. U. S., 330 U.S. 395, 67 S.Ct. 775, 91 L.Ed. 973. We think the section was intended to cover the acts of officers of the union who deal with employers or with the public. That is, if a union puts or lets an officer or other representative get into a position where he can and does cause trouble proscribed by the act then the union is responsible."

In United Mine Workers v. Patton,[6] it was said:

> "The chief argument of defendans in support of their motion for directed verdict is that there is no evidence that they authorized or ratified the strikes upon which plaintiffs rely for recovery. It is true that there is no evidence of any resolution of either the United Mine Workers or District 28 authorizing or ratifying the strikes. There is evidence, however, that the strikes were called by the Field Representative

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[3] 29 U.S.C.A 151 et seq.

[4] International Longshoremen's, etc. Local 8 v. Hawaiian Pineapple Co. 226 F.2d 875.

[5] "For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling (June 23, 1947, c. 120 Title III, § 301, 61 Stat. 156.)"

[6] 4 Cir., 211 F.2d 742, 746.

of the U.M.W., who was employed by District 28, and that he was engaged in the organization work that was being carried on by the international union through District 28, which was a mere division of the international union. Members of the union are members of local and district unions as well as the international; and of the $4 monthly dues paid by them, $2 goes to the international union, $1 to the local union and $1 to the district organization. It is clear that in carrying on organizational work the field representative is engaged in the business of both the international union and the district and that both are responsible for acts done by him within the scope and course of his employment (citing cases)."

Points V through IX claim error in failing to grant motions for directed verdict at various stages of the proceedings, because 1) any evidence of damage was so speculative as not to support the verdict, 2) plaintiff had no contract with the Assocation or Dorman's, 3) there was no evidence that Dorman's refused to purchase cheese because of the picketing, 4) Dorman's were willing to continue said purchases, and 5) because plaintiff's hauling business was an unlicensed interstate operation. All of these contentions, except 2) are supported by evidence to the contrary which the jury could have resolved and did resolve in favor of the plaintiff, which conclusions we are not constrained to upset.

As to plaintiff having no contract for any definite time with the Association or Dorman, we know of no authority that will preclude recovery of damages in a tort action because contractual sales and purchases between plaintiff and Dorman's for better

than two years. The evidence shows that the Dormans wanted deliveries and plaintiff wanted to continue to make them, and it appears that such an extended business relationship at least presumptively would have prevailed indefinitely had it not been for the unauthorized picketing.

As to Point X which claims error in rejecting an affidavit by one Corbett having to do with plaintiff's relationship with the Association (which affidavit was filed after the trial), the facts recited therein were available to defendants during the trial by way of discovery or otherwise and there is no showing made of their nonavailability.

Point XI complains that the court erred in sustaining an objection to testimony that wages were less in another area than those paid by the Association. We can see no relevancy in such testimony as it might bear on an unlawful picketing situation between the union and the plaintiff, not the Association.

We believe the remaining points are not well taken: One having to do with admission of a letter requested to be produced by defendants, because it appears to have materiality in support of plaintiff's claim of union interference; another having to do with the introduction in evidence of an audit, because it appears to have been received without objection; and the last having to do with the contention that it was error not to have granted a new trial, because we fail to find any reasons stated therein warranting the granting thereof under our rules,* and defendants

* Rule 59, Utah Rules of Civil Procedure.

have failed to point out any of the grounds under said rules that would justify the granting thereof.

* WE CONCUR:

.....

ROGER I. MCDONOUGH, *Chief Justice*

.....

LESTER A. WADE, *Justice*

CROCKETT and WORTHEN, JJ., concur in results.

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* The foregoing opinion is reported at 8 Ut. 2d 124, 329 P. 2d 414 (1958).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 642

WESTERN CONFERENCE OF TEAMSTERS

Petitioner,

v.

DAIRY DISTRIBUTORS, INC.

Respondent.

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

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NO. 642

WESTERN CONFERENCE OF TEAMSTERS

Petitioner,

DAIRY DISTRIBUTORS, INC.

Respondent

Reply to Brief for the Respondent in Opposition

In Point III of its petition, the petitioner has sought to demonstrate that, in the interest of accommodating and harmonizing federal laws and policies, the policies of the Interstate Commerce Act (49 USC 1, et seq.), respondent should not be permitted to recover damages under the NLRA for injury to a business that has been operated in criminal violation of the ICA. In its Brief in opposition, respondent has made certain representations relative to this issue that require an answer.

Thus, respondent asserted the following:

"From the very start of this litigation, petitioner has asserted the claim of illegality of respondent's business. The conclusion is inescapable that petitioner has never been able to prove the facts upon which the claim of illegality must rest." Brief of Respondent, p. 3.

This assertion is not supported by the facts of this case. In the United States District Court below, respondent answered the complaint, in part, as follows: "The defendant

admits that it is a corporation, and that defendant operated its trucks without a certificate of convenience and necessity from the Interstate Commerce Commission." (R.40). On the basis of this admission and the evidence submitted relating to the respondent's interstate operation (Petition, p. 3), the District Court made the following finding of fact and conclusion of law:

> At all times complained of in the state court action the defendant, Dairy Distributors, Inc., was engaged in interstate commerce as a contract carrier by motor vehicle, hauling cheese from Utah to New York and hauling various other items from points in the East and Midwest to Utah. There was no evidence in the state court record, nor in the record here, that the defendant, Dairy Distributors, Inc., had a certificate of convenience and necessity from the Interstate Commerce Commission to engage in said trucking operation. There was, however, affirmative evidence in the state court record, and in the record here, and counsel for defendant admit, that defendant, Dairy Distributors, Inc., did not have such a permit, and such is the finding of this court. The engaging in interstate commerce without such a permit constitutes a criminal offense as provided in Title 49, Section 322, U.S.C.A. (R 46)
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> • • • • •
>
> The State court judgment was a recovery for injuries to an illegal business which was operating in violation of the laws and policy of the United States, and its enforcement should be enjoined to protect the interests of the United States, its citizens and the transportation of goods and merchandise in interstate commerce. (R. 48)
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> • • • • •

This finding and conclusion was left undisturbed by the Court below.

Respondent would further have us believe that the above decision was somehow inconsistent with action taken by the ICC. Thus, respondent supplies the following quotation from the opinion of the Court of Appeals below:

> The record here indicates that the Commission has licensed the appellant (respondent here) as a private carrier; no complaint of this action has been made to the Commission; and if damage arose as a result of improper licensing or improper use of the granted certificate, it is not apparent. (294 F. 2d 348, 353). (Brief of Respondent, p. 21)

In this respect, both the Court below and the respondent, neither of whom supplied a citation to the record, are clearly in error. There is not a shred of evidence in the record that the ICC issued a license or a certificate to the respondent as a private carrier.[1] Nor could there be any such evidence; for the Interstate Commerce Act, while requiring a certificate for contract carriers (Section 309) and common carriers (Section 306) and subjecting private carriers to certain safety regulations (Section 304(3)), does not empower or authorize the ICC to issue a license or certificate to private carriers.

Finally, respondent places the main brunt of its argument on the doctrine of res judicata. However, as noted in the Petition (p. 19, at footnote 11), the Court below rejected the application of that doctrine to the instant issue because it was not clear whether the state courts had considered and acted upon it.

It is respectfully submitted that the decision of the Court below failed to give due weight to the principle of accommodation of federal laws, contrary to the direction of this

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[1] This point was duly raised in the petition for rehearing in the Court below.

Court, and ignored the National Transportation Policy to the detriment of the entire transportation industry. Therefore, and for the other reasons stated in the Petition, the Petition for a Writ of Certiorari should be granted.

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